

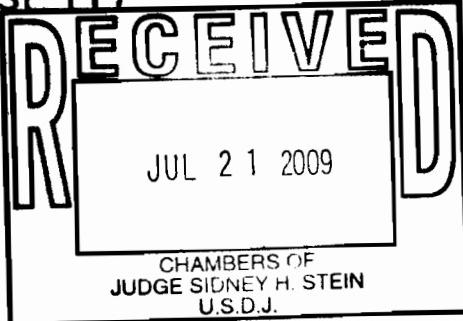
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PROSKAUER ROSE LLP

A NEW YORK LIMITED LIABILITY PARTNERSHIP  
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July 21, 2009

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Via Facsimile

The Honorable Sidney H. Stein, U.S.D.J.  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

MEMO ENDORSED

Re: Pasternack v. Maxim Group LLC, 09 Civ. 5579 (SHS)

Your Honor:

We represent Defendant Maxim Group LLC ("Maxim" or "Defendant") in the above-referenced action. We write in regard to plaintiffs' motion to "certify" a collective action pursuant to 29 U.S.C. § 216(b) (including plaintiffs' annexed affidavits and memorandum of law) (the "Motion"). As Your Honor may recall, plaintiffs filed the Motion moments before the July 14, 2009 telephone conference with the Court to discuss plaintiffs' application for Court supervision of Maxim's communications with its employees and other potential class members. In light of Your Honor's July 14, 2009 Order (the "Order"), Maxim respectfully requests that the Motion be held in abeyance until after the August 13, 2009 initial conference referenced in that Order.

To justify their Motion at this early stage (pre-Answer and pre-initial Court conference) plaintiffs express a concern that "Maxim has already attempted, and will likely continue to attempt, to harass its current and former employees into not participating in the action" and therefore ask that the Court act "promptly" in granting the Motion. (Pls' Br. at 2). Following the filing of the Motion, however, Your Honor heard argument from the parties and entered the July 14, 2009 Order which states that "Defendant may continue to communicate with its employees for the purpose of gathering facts. Defendant may not seek affidavits, waivers, releases, or 'opt outs' relating to this litigation until further order of this Court." During the July 14, 2009 conference, Plaintiffs' counsel expressly acknowledged that these measures were adequate to protect plaintiffs' interests. Further, in response to a question from Your Honor, he conceded that the concern expressed in his moving papers was *not* a basis for the certification Motion.

7/24/09  
Requested  
Initial Pre-trial  
conference advanced  
from Aug 13 to Aug 14  
at 11:30 A.M.  
in abeyance in the interim  
until after the initial  
Court conference.

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Plaintiffs' only additional reason for having brought the motion now -- that in the absence of a "certified" collective class, "the claims of these victims [the potential opt-ins] are dying on a daily basis" -- is simply untrue. (Pls' Br. at 1). The FLSA does not specify when opt-in consent forms may or may not be filed; thus, courts permit opt-ins to be filed at any time. *See Cohleach v. Bear, Stearns and Co., Inc.*, 440 F. Supp. 2d 338, 340 (S.D.N.Y. 2006) ("During the eight months this suit has been pending, plaintiff has been free to invite other potential plaintiffs to join his FLSA claim. All potential plaintiffs are registered brokers and many were co-workers of the plaintiff."). Plaintiffs' lawsuit is a matter of public record and, in fact, four individuals have already opted-in to the litigation. Two of these opt-ins left Maxim more than a year ago. Moreover, Defendant has done nothing to preclude or hinder any person from joining this litigation as an opt-in plaintiff.

Of equal importance, Defendant cannot oppose the Motion at this time due to the constraint imposed by the Court's July 14, 2009 Order. In order to adequately oppose the Motion, Maxim will need to prepare and submit affidavits which relate to the allegations raised by plaintiffs. *See Fasanelli v. Heartland Brewery*, 516 F.Supp.2d 317, 321 (S.D.N.Y. 2007) (court must determine based upon the pleadings and affidavits, whether or not the class is appropriate for certification); *Cuzco v. Orion Builders, Inc.*, 477 F.Supp.2d 628, 632 (S.D.N.Y. 2007) (same). *See also Saxton v. Title Max of Alabama, Inc.*, 431 F.Supp.2d 1185, 1188 (N.D. Ala. 2006) (denied plaintiffs' motion for conditional class certification based, in part, on defendant's submission of affidavits in opposition to plaintiffs' conditional class certification motion). However, Your Honor's Order makes clear that "Defendant may not seek affidavits...relating to this litigation until further order of this Court." As discussed during the July 14 conference, a modification of the Order is warranted and should be addressed at the August 13 conference.

Finally, Your Honor's July 14 Order instructed the Parties to "meet to discuss settlement as well as a proposed schedule for discovery and further proceedings." Defendant's counsel intends to propose to plaintiffs' counsel both a discovery schedule and a briefing schedule on the Motion so that a complete schedule can be presented to and discussed with the Court on August 13. In the interim, we have agreed to discuss settlement as well.

For all of the above reasons, the Court should stay Plaintiffs' Motion, and the deadline for Defendant's opposition thereto, until the August 13 conference at which a briefing schedule can be established. We thank the Court for its attention to this matter.

Respectfully submitted,



Lawrence R. Sandak

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cc: Todd A. Gutfleisch, Esq. (via facsimile)